

Federal Court



Cour fédérale

Date: 20220504

Docket: T-306-22

Toronto, Ontario, May 4, 2022

PRESENT: Case Management Judge Martha Milczynski

BETWEEN:

**CANADIAN FRONTLINE NURSES
AND KRISTEN NAGLE**

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER

UPON MOTION filed in writing on behalf of the Applicants, Canadian Frontline Nurses and Kristen Nagle on March 29, 2022 pursuant to Rule 369 of the *Federal Courts Rules* for an order granting the Applicants leave to amend the Notice of Application in the form set out in Schedule “A” of the notice of motion;

AND UPON reviewing the motion record filed on behalf of the Applicants, the motion record filed on April 12, 2022 on behalf of the Respondent opposing the relief sought, and upon reviewing the reply filed on April 19, 2022;

The within proceeding is an application for judicial review challenging the constitutionality of the Emergency Proclamation issued by the Governor in Council on February 14, 2022 and its associated public order and economic measures regulations. In the original application, the Applicants requested the following relief:

1. An order pursuant to Rule 317 for production of all Orders in Council, minutes of meetings, cabinet submissions, memoranda, agreements and constituting documents relating to the Public Order Emergency Proclamation;
2. A declaration that the Respondent acted without or beyond its jurisdiction in issuing the Proclamation;
3. Declarations that the Proclamation violates the *Canadian Bill of Rights*, that pursuant to section 52 of the *Constitution Act 1982*, it is inconsistent with section 2 of the *Canadian Charter of Rights and Freedoms* not justified by section 1 of the *Charter*;
4. A declaration that the Emergency Proclamation is unlawful or invalid;
5. An order quashing the Emergency Proclamation and any regulations, orders or other measures issued or implemented pursuant to it;
6. An interim stay of the Emergency Proclamation and any regulations, orders or other measures implemented pursuant to it until the application is heard on its merits;
7. Leave for this application to include any regulations, orders or other measures implemented pursuant to the Proclamation;

8. A writ of prohibition prohibiting the Respondent from issuing further public order emergency proclamations in the absence of a “public order emergency” as defined in the *Emergency Act*; and
9. Costs on a substantial indemnity or full indemnity basis.

The Applicants’ proposed amendments to the Notice of Application are the following:

- To remove the request for an interim stay of the Emergency Proclamation (in light of the Revocation Proclamation being issued on February 24, 2022 and the Applicants’ urgent stay application being dismissed as moot);
- To particularize the *Charter* section 2 pleading (adding reference to ss.2(b)(c) and (d)) and to add pleadings under section 7, 8, 9 and 11 of the *Canadian Charter of Rights and Freedoms*;
- To add pleadings under section 2 of the *Bill of Rights*;
- To include the *Interpretation Act* as legislation to be relied upon; and
- To specify the evidence to be relied upon, namely two additional affidavits (that of Tom Marazzo sworn March 4, 2022 and Simon Siegler sworn March 4, 2022) and an updated affidavit from Kristen Nagle sworn March 4, 2022.

The Respondent opposes the amendments on various grounds, including on the grounds of mootness and standing – in respect of which the Respondent has also filed a cross motion to dismiss the application in its entirety. As previously directed, the question of whether the underlying application is moot as a result of the Revocation Proclamation is to be determined at a later date, on the basis of a full evidentiary record and submissions. The issue of both mootness

and standing shall also, as previously directed, be determined by the judge hearing the application at the hearing of the application.

Accordingly, the within motion to amend the Notice of Application will be determined in accordance with the *Federal Courts Rules* and principles governing amendments to applications. Under Rule 75(1), the court may grant leave to amend a pleading at any time on such terms that will respect the rights of the parties. There is no dispute that this provision relating to pleadings applies to notices of application for judicial review (*AstraZeneca AB v Apotex Inc*, 2006 FC 7). While both parties make submissions and rely on various decisions of this Court regarding the threshold and standards of the test, the factors that will be considered include:

- Whether the proposed amendments go to the dispute/questions in controversy between the parties;
- Whether the proposed amendments would cause prejudice or result in an injustice to the other party that is not compensable by an award of costs;
- Whether the proposed amendments would be in the interests of justice; and
- Whether the proposed amendments have some reasonable prospect of success – or put another way, whether on a motion to strike if part of an original pleading, would the proposed amendment be capable of being struck out, the question being essentially, is it plain and obvious – that the pleading is so clearly improper that it is bereft of any possibility of success and is doomed to fail. As noted in *McCain Foods Ltd. V. J.R. Simplot Company*, 2021 FCA 4 – if the answer is yes to the question of whether the plea is capable of being struck out, the amendment should not be allowed.

With respect to the within motion, save for the proposed amendments to include sections 9 and 11 of the *Charter*, I am satisfied that the proposed amendments go to the dispute and the real questions in controversy between the parties. The Applicants' proposed reliance on the *Interpretation Act*, sections 2(b)(c)(d), 7, and 8 of the *Charter* and section 2 of the *Bill of Rights* go to the interpretation and their challenge to the constitutional validity of the Emergency Proclamation and are sustained by the Applicants' already pleaded grounds for the relief sought in respect of those provisions.

The current Notice of Application states:

CFN is a participating group in the Freedom Convoy 2022. CFN and Nagle both support the Freedom Convoy 2022 Protest in Ottawa and its objectives. Nagle, as a representative of CFN, has given speeches in support of the Freedom Convoy 2022 Protect in Ottawa. CFN and Nagle have been and intend to continue to be peaceful participants and supporters of the Freedom Convoy in Ottawa.

I also accept that to some extent the proposed amendments are housekeeping in nature and are to bring it in line with the Applicants' Notice of Constitutional Question, which was served the day after the Application was issued, and with what is in the pleaded grounds already in the notice of application. As required by Rule 301(e) of the *Federal Courts Rules*, the Notice of Application must contain a complete and concise statement of the grounds to be argued, including reference to any statutory provisions or rule to be relied upon. All legal bases and material facts necessary to support the claim for the relief sought must be set out in the Notice. Accordingly, I am not satisfied that, as a pleadings matter, it is plain and obvious at this juncture that the Applicants' proposed amendments to include declarations that their rights to free

expression, peaceful assembly, (ss. 2(b)(c)(d), liberty interests (s.7) and the protection from unreasonable search and seizure (s.8) are clearly improper and doomed to fail.

The section 9 right not to be arbitrarily detained or imprisoned, however, is simply asserted but no facts/grounds are pleaded to state that the Applicants or anyone was detained or imprisoned. Similarly, no facts/grounds are pleaded in relation to the alleged violation of section 11 of the *Charter* right to be tried in a reasonable time, and to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. The assertion of a breach of section 11 of the Charter does not relate to any government action. The affidavit of Kristen Nagle sworn on March 4, 2022 states that she was neither charged under the emergency measures, nor were her or the Canadian Frontline Nurses' bank accounts frozen.

The motion will thus be granted in part, as set out below.

THIS COURT ORDERS that:

1. Applicants are granted leave to amend their Notice of Application in the manner set out in Schedule "A" of their notice of motion, with the exception of reference to sections 9 and 11 of the *Canadian Charter of Rights and Freedoms*.
2. Considering the divided result, each party shall assume their own costs of this motion.

"Martha Milczynski"
Case Management Judge